BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DWAINE F. KINGSLEY	)	
Claimant	)	
V.	)	
	)	Docket No. 1,074,548
PENINSULA GAMING PARTNERS	)	
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 30, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from September 15, 2015, with exhibits attached; the transcript of Preliminary Hearing from December 1, 2015, with exhibits attached; the telephonic deposition transcript of Douglas Cady, from November 30, 2015, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant provided timely notice and concluded claimant met his burden of proving the work injury is the prevailing factor for his need for medical treatment. The ALJ cautioned that, should respondent locate additional medical evidence or opinions regarding prevailing factor, the issue may be revisited. The ALJ ordered Sumner County Family Care Center (Sumner County) to remain authorized to provide claimant treatment for his right shoulder.

Respondent appeals, arguing claimant has failed to prove timely notice and compensability of the injury and, therefore, the Order should be reversed.

Claimant contends the Order should be affirmed.

The issues on appeal are:

1. Did claimant meet with personal injury by repetitive trauma arising out of and in the course of his employment with respondent?

2. Was timely notice given?

FINDINGS OF FACT

Claimant began working for respondent on March 27, 2014, as a dishwasher. He is alleging injury to his right shoulder suffered in the course of his employment. Claimant acknowledged he had a prior right shoulder injury when the truck in which he was riding was struck by a train. Claimant suffered a significant injury that required surgery, although claimant acknowledged he lived with the shoulder problem for about 10 years before undergoing the surgery. That 2009 surgery was not successful in alleviating his problems.

In September 2014, claimant sustained a workers compensation injury while working for respondent when he grabbed a hot pot and suffered a burn to his hand. Claimant reported the injury to his supervisor, Douglas Cady, who instructed claimant to report it to the security office. Claimant acknowledged that is the procedure for reporting work injuries. The security personnel took pictures of claimant's burned hand and of the pot he handled. Surveillance video of the kitchen area was also reviewed. The day after the accident, claimant was sent to the company doctor to have his hand examined. Claimant was given an accident report to fill out and received medical treatment.

On Friday, June 12, 2015, claimant sought medical treatment with his doctor at Sumner County for right shoulder pain that began a month before. Claimant did not seek authorization for this visit. Claimant indicated he does not remember why he went to his family doctor instead of asking to see the company doctor for his right shoulder. Claimant met with Whitney Newberry, a nurse practitioner. In an office note of June 12, 2015, Ms. Newberry noted claimant's shoulder pain was due to repeated lifting at work. Ms. Newberry recommended therapy and lifting restrictions were given. Claimant returned to work a day or two after seeing the doctor and presented Mr. Cady with written restrictions from Sumner County. Claimant testified this contact with Mr. Cady occurred on a Wednesday. Claimant denies telling Mr. Cady that he hurt his shoulder at home after tripping over his dog or that he fell at a friend's house.

Claimant testified he asked for a workers compensation claim form and to be sent to a doctor, but was told to go back to work. Claimant alleges he continued to pester Mr.

Cady about his shoulder injury because the procedure followed for his hand injury was not followed for his shoulder. Claimant did not go to human resources (HR) to report his injury in the morning before work because he was running late. Claimant acknowledged he was not running late for work every day, but still failed to go to HR at any time to report the injury. Claimant testified that when he presented Mr. Cady with the work restrictions he told Mr. Cady he hurt his shoulder at work while lifting plates. He denied telling Mr. Cady he hurt his shoulder away from the job site.

Claimant's employment was terminated on July 15, 2015, after dirty pans were found with the clean dishes. Mr. Cady stated claimant had issues with making sure dishes were clean before he put them with clean ones. When claimant was terminated by someone from HR, he again failed to mention anything about his workers compensation injury or needing medical treatment. Claimant reasoned this was because he was terminated as soon as he showed up for work and did not get the chance.

Mr. Cady, former executive chef for respondent, testified his main duties for respondent were to oversee the kitchen and the Woodfire Grille. He worked for respondent from January 2013 to August 2015. Mr. Cady was claimant's direct supervisor. He testified claimant's job was to wash dishes, maintain the dish area, clean and mop the floor and make sure all the pots and pains were put away clean.

Mr. Cady indicated that in May or June 2015 he was made aware that claimant was claiming a shoulder injury outside of work. Mr. Cady remembers claimant's saying he injured his shoulder when he fell at a friend's house or fell walking a dog. Neither of those events were related to claimant's work. Mr. Cady testified claimant brought in a restricted work notice from a doctor and he instructed claimant to take the notice to HR.

Mr. Cady testified that the procedure for reporting work injuries was to inform the direct supervisor immediately so that the employee can be taken to the security area to fill out a report. The safety manager is in charge of gathering all of the necessary information for the report and for submitting it to HR. Had claimant told Mr. Cady that his problem was from work, the appropriate paperwork would have been filled out and a report created. Mr. Cady testified that this procedure was not followed in claimant's shoulder case because there was no work injury. He does not know why claimant would tell the doctor's office that he was injured at work.

Mr. Cady testified claimant's employment with respondent was terminated for work performance issues. He testified claimant was not cleaning all of the pots and pans properly and that he was putting dirty dishes on top of clean ones, which is a health violation. Mr. Cady indicated that even after claimant's employment was terminated, he did not report his right shoulder problem as a work injury. Mr. Cady acknowledged he did not meet with claimant for his final write-up, he merely signed off on the final paperwork and it was taken to HR.

Mr. Cady testified that the first he learned of claimant claiming a workers compensation injury to his right shoulder was two weeks before his November 30, 2015, deposition.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(e) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2014 Supp. 44-508(f)(1)(2)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

> An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant sought medical treatment for his shoulder with his personal health care provider while at the same time advising the health care provider that his shoulder pain stemmed from the repeated lifting at work. Then, when claimant took his restrictions from that visit to respondent, it is claimed that claimant changed his story to describe an injury either while walking a dog or at friends house. Claimant alleges he told Mr. Cady of his shoulder problems and the work-related connection to those problems. It is difficult to comprehend why claimant would tell his health care provider of a work-related connection to his shoulder problems and then, when requesting restricted duties, change his story. The ALJ apparently deemed claimant's story believable, at least temporarily, enough to justify the award of benefits.

This Board Member finds claimant has satisfied his burden, although by the barest of margins, that he suffered a series of microtraumas while working for respondent.

Respondent denies claimant provided timely notice of his alleged series of injuries. In order to determine the timeliness of notice, there must first be a determination of the appropriate date of injury in this matter. Under the statute, the date of injury by repetitive trauma may be established by a physician who either takes an employee off work, places an employee on modified or restricted duty due to the diagnosed repetitive trauma or advises the employee that the injuries are work-related. None of those conditions were met in this instance as claimant never met with a physician while he was employed by respondent. The final criteria for establishing a date of injury by repetitive trauma is the employee's last day worked for the employer against whom the benefits are being sought.

K.S.A. 2014 Supp. 44-520(a)(1)(C) states:

> (a) (1) . . .
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.

In this instance, claimant last worked for respondent on July 15, 2015. This establishes July 15, 2015, as the date of accident. Claimant filed his Application For Hearing with the Division on July 21, 2015, with a claim letter to respondent being delivered by certified mail on July 23, 2015. Claimant had 10 days from his last day worked in which to provide timely notice. Claimant has complied with that statutory requirement. Notice in this matter was timely provided to respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has, for preliminary hearing purposes, satisfied his burden of proving he suffered personal injury by repetitive trauma while working for respondent and timely notice was provided.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated December 30, 2015, is affirmed.

[1] K.S.A. 2014 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge